

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, <i>et al.</i>)	
)	
Plaintiffs,)	
)	
v.)	Case No. 4:05-cv-00329-GKF-PJC
)	
TYSON FOODS, INC., <i>et al.</i>)	
)	
Defendants.)	
)	

**REPLY IN SUPPORT OF DEFENDANTS’ MOTION IN LIMINE TO PRECLUDE
GENERALIZED REFERENCES TO DEFENDANTS ON ISSUES
REQUIRING DEFENDANT-SPECIFIC PROOF**

Plaintiffs’ *Response in Opposition to Defendants’ Motion In Limine To Preclude Generalized References To Defendants On Issues Requiring Defendant-Specific Proof*, Dkt. No. 2476 (Aug. 20, 2009) (“Opposition”) conflates the indivisibility of an injury with the requirement to show causation.¹ Plaintiffs leap straight to joint and several liability, *see* Opp. at 2, skipping entirely the first step of actually proving each individual Defendants’ contribution to the alleged injury. As set forth in Defendants’ Causation Motion and *Defendants’ Motion In Limine To Preclude Generalized References To Defendants On Issues Requiring Defendant-Specific Proof*, Dkt. No. 2399 (Aug. 5, 2009) (“Motion”), Plaintiffs must show the basic and required element of causation *as to each Defendant*. The law does not permit liability based on the mere assumption that all defendants, simply by virtue of being named in the suit, committed an act that caused the injury of which Plaintiffs complain. To date, Plaintiffs’ case has consisted

¹ *See Defendants’ Motion for Partial Summary Judgment Dismissing Counts 1, 2, 3, 4, 5, 6 and 10 Due to Lack of Defendant-Specific Causation and Dismissing Claims of Joint and Several Liability Under Counts 4, 6 and 10*, Dkt. No. 2069, (May 18, 2009) (“Causation Motion”).

chiefly of undifferentiated claims concerning the “poultry industry,” an entity of their own creation that includes companies not included in this lawsuit. *See* Motion at 2. In closing, Plaintiffs now assure the Court that they will adduce such Defendant-specific proof. *Opp.* at 4. Once Plaintiffs have done so, then aggregate references to Defendants are permissible. But until they have introduced evidence that each Defendant may be held accountable for certain conduct, language attributing the acts of one or a few to all is impermissibly confusing and prejudicial and should be prevented.

I. Unsupported Generalizations Against Defendants Are Irrelevant Under Federal Rule of Evidence 402

Plaintiffs base their Opposition on their claim that indivisible injury gives rise to joint and several liability. *See Opp.* at 2. But this misses the thrust of Defendants’ Motion, which seeks to prohibit Plaintiffs from eliciting generic claims about Defendants or the “poultry industry” generally without having presented evidence that links each Defendant to the alleged injury. Plaintiffs must show causation as to each, individual Defendant. *See Twyman v. GHK Corp.*, 93 P.3d 51, 54 n. 4 (Okla. Civ. App. 2004); *Angell v. Polaris Prod. Corp.*, 280 Fed.Appx. 748, 2008 U.S. App. LEXIS 12007 (10th Cir. June 4, 2008); *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 114 (Mo. 2007); *see also* Causation Mot. at 16-21; Motion at 5. Because undifferentiated evidence has no bearing on individual Defendants unless its applicability as to each Defendant has already been established, it is irrelevant for failing to make “more probable or less probable” any fact that is “of consequence to the determination of the action.” Fed. R. Evid. 401.

II. Unsupported Generalizations Against Defendants Would be Unfairly Prejudicial, Would Confuse the Evidence, and Would Mislead the Jury Under Federal Rule of Evidence 403

Any effort to tar all Defendants with the conduct of others, where individual causation has not been established, would be confusing and unfairly prejudicial because, in contravention of Federal Rule of Evidence 403, it has a “tendency to suggest a decision on an improper basis.” *United States v. Wilson*, 276 Fed.Appx. 859, 861 (10th Cir. 2008) (quoting *United States v. Curtis*, 344 F.3d 1057, 1067 (10th Cir. 2003)); *see also Stump v. Gates*, 211 F.3d 527, 534 (10th Cir. 2000). Such evidence would improperly invite the factfinder to find liability based on mere speculation rather than on true evidence of causation.

Plaintiffs’ principal response is a procedural one, that compliance with Federal Rule of Evidence 403 would be “amorphous and untenable” and would unduly burden the Court. Opp. at 2. But the point of Defendants’ Motion is to alleviate the burden on the Court. Plaintiffs will control the order and pace of their case, and if ordered to proceed with showing a case against each Defendant before resorting to generalities there should be no need for any such burden. And at any rate, the burden on Plaintiffs to proceed in an appropriate manner does not outweigh each individual Defendant’s right to have a case proved specifically against it. Rule 403 excludes evidence that poses a “danger of unfair prejudice, confusion of the issues, or misleading the jury.” Fed. R. Evid. 403. As Defendants’ Motion points out, courts have consistently understood this to prevent parties from making generalized references that aggregate similarly situated groups of defendants. *See* Motion at 6; *see also United States v. Edwards*, 159 F.3d 1117, 1127 (8th Cir. 1998); *Smith v. Arthur Andersen*, 2005 WL 5976558, at *1 (D. Ariz. 2005) (granting similar motion to prevent references to underwriters as a group). A similar preclusion is appropriate here, where failure to do so will lead to confusion and unfair prejudice.

CONCLUSION

For the aforementioned reasons and those included in *Defendants' Motion In Limine To Preclude Generalized References To Defendants On Issues Requiring Defendant-Specific Proof*, (Dkt. No. 2399), the Court should grant Defendants' Motion and preclude Plaintiffs from making generalized references to Defendants on issues requiring defendant-specific proof.

Respectfully submitted,

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